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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. 399

ROBERT E. HANNEGAN, AS POSTMASTER GENERAL OF THE UNITED STATES, PETITIONER,

vs.

ESQUIRE, INC., RESPONDENT.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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STATUTES AND AUTHORITIES

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ROBERT E. HANNEGAN,[1] AS POSTMASTER GENERAL OF THE UNITED STATES, PETITIONER, vs. ESQUIRE, INC., RESPONDENT.	No. 309

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

STATEMENT

The issue in the case is whether the Postmaster General has power, in respect of a magazine which he has himself decided *not* to be obscene, to deny it second-class mailing entry on the ground that it contains material which in his opinion is objectionable and does not meet his test of making a positive contribution "to the public good and the public welfare" (R. 1863).

We contend that no question is presented to justify granting of certiorari.

[1] Substituted, on motion of petitioner, in place of Frank C. Walker, his predecessor. Throughout this brief the terms "Postmaster General" and "petitioner" generally refer to Mr. Walker.

(a) The Citation and Post Office Department Hearings.

Respondent is the publisher of the monthly periodical Esquire Magazine. The publication conforms to the practice of most present day magazines of presenting stories, articles, stage and screen departments, pictorial features, cartoons, jokes, correspondence with the editors and advertising.[2]

On September 11, 1943, petitioner caused a citation to be issued requiring respondent to show cause why its second-class mailing rights in respect of Esquire Magazine should not be revoked (R. 1-2, 6). A fair reading of the citation shows that it was based upon the ground that certain specified material contained in eleven issues of the magazine was non-mailable because obscene within the meaning of the so-called obscenity statute.[3] Esquire denied the charge and thereafter hearings were held before a Hearing Board appointed by the Postmaster General. A new charge (introduced in the second week of the hearings) is the only one with which we are now concerned. That charge in substance was that even if the magazine was not obscene and therefore was mailable, it nevertheless was not entitled to second-class mailing rates since it did not comply with the Fourth Condition relating to such second-class mail i.e., that it "be originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts or some special industry, * * *"[4] (R. 601-7). It thus involved the claim that

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[2]In the words of the Court of Appeals, it is "a well-known magazine of general circulation. It contains stories, articles, literary and dramatic reviews. Its contributors include distinguished authors, clergymen and professors in our best educational institutions." (R. 1987).

[3]35 Stat. 1129 (18 U. S. C. 334).

[4]20 Stat. 359 (39 U. S. C. 226).

the content of the magazine was not "public information", "literature" or "art". In addition to the fact that it is obvious on the face of the magazine that its content comes within these categories, the new charge was promptly met and disposed of by expert witnesses, who analyzed the entire content of the magazine from the standpoint of such categories and compared its content and editorial formula with that of other leading magazines (See for example R. 881, 1191-4, 1137, 1151-2).

(b) The Hearing Board Recommendations and Findings.

On November 11, 1943, after the hearings had been completed, the Hearing Board filed its Recommendations that the proceeding "be dismissed and that the second-class entry of the magazine, Esquire be continued in full force and effect" (R. 1839). At the same time the Board filed its Findings (1) that the charge of obscenity "has not been supported and proved in fact or in law" and (2) that the publication "has not failed to comply" with the Fourth Condition of the statute (R. 1838-9). One member of the Hearing Board dissented on the obscenity issue, solely on the ground that he regarded a one-page item (out of 1972 pages in the ~~H.~~cited issues) as obscene, that the entire issue containing such item was therefore non-mailable, and that Esquire's second-class mailing rights should be revoked because its regularity of issuance was thereby interrupted (R. 1851-5).

On November 22, 1943, at the Postmaster General's suggestion, Walter Myers, Chairman of the Hearing Board, made a "Supplementary Recommendation" (R.

1892) in which he again advised that obscenity had not been established, stated that an attempt to withhold second-class rates from an otherwise mailable periodical such as Esquire on an alleged violation of the Fourth Condition would be contrary to law, and suggested that the Postmaster General might recommend new legislation to Congress as a possible means of withholding second-class rates from publications which he might regard as coarse and objectionable (Pl.'s Ex. 25 for Iden. in Dist. Ct.).

(c) The Order of the Postmaster General.

On December 30, 1943, the Postmaster General handed down an order revoking Esquire's second-class mailing rights (R. 1856-65). The order disregarded both the Findings and Recommendations of the Hearing Board and the Supplementary Recommendations of Chairman Myers. It based the revocation on the ground that the magazine did not comply with the Fourth Condition because it did not meet the Postmaster General's test of a "positive duty to contribute to the public good and the public welfare (R. 1863).

(d) The Proceedings in the District Court.

On January 21, 1944, Esquire commenced an action in the District Court for the District of Columbia to enjoin the revocation order.[4] On July 10, 11 and 12, 1944, the case was tried in the District Court before Judge T. Whitfield Davidson.[5] The evidence consisted of the entire rec-

[5]United States District Judge from the Northern District of Texas, sitting on special assignment in the District Court for the District of Columbia.

ord of the proceedings before the Post Office Department and proof to establish that the occasion of the instant case was the first in 65 years of administrative practice when a Postmaster General resorted to the Fourth Condition to justify a qualitative evaluation of the content of a periodical publication as a condition of entry to second-class mail.

On July 15, 1945, the District Court handed down its opinion, sustaining the Postmaster General (R. 1963-75), reported at 55 F. Supp. 1015). The opinion discussed at length the educational environment of members of Congress at the time of the enactment of the Postal Law (March 3, 1879) and concluded that the Postmaster General was warranted in holding that "the literature" referred to in the statute meant "literature of desirable type of an educational value" (R. 1969). The opinion further stated that Esquire was not "deprived of property" since it could still mail its magazine; although admittedly at the additional cost of $500,000 per year (R. 1972). With respect to freedom of the press, the District Court stated that there was no abridgement of Esquire's constitutional rights because if the Postmaster General was arbitrary, his action was subject to review by the courts, that the Postmaster General was also subject to the will of the President, and that, in any event, if the Postmaster General generally misinterpreted the law, "Congress can rewrite the Act" (R. 1973). Finally, the opinion stated that the Postmaster General's action was in good faith and not arbitrary and, therefore, conclusive on the Court. Esquire's demand for an injunction was denied and its complaint dismissed (R. 1979).

(e) The Decision of the Court of Appeals.

On June 4, 1945 the Court of Appeals for the District of Columbia unanimously reversed the District Court (R. 1987-95).

The question presented to and passed upon by the Court of Appeals was strictly limited since, while case was pending in the District Court, the Postmaster General stipulated or conceded that the magazine did not violate the obscenity statute, that it was mailable, that it complied with all conditions of second-class mail other than the Fourth Condition, and that the revocation order would cause irreparable injury (R. 26, 1891-3).

Accordingly, the sole question before the Court of Appeals was whether the Fourth Condition could be construed, as the Postmaster General in effect contended, to enable him to measure all periodicals enjoying second-class rates by his personal standards and moral yardstick and if he found that any of them did not measure up to his test of "positive duty to contribute to the public good and public welfare," withhold the second-class rates and thus deny them any practicable use of the mails.

The Court of Appeals held that the Fourth Condition cannot be so construed. The essence of the holding is contained in the Court's words that "It is inconceivable that Congress intended to delegate such power to an administrative official or that the exercise of such power, if delegated, could be held constitutional" (R. 1988).

THE CASE DOES NOT PRESENT ANY QUESTION APPROPRIATE FOR THIS COURT TO REVIEW

The Postmaster General's petition asks this Court to pass upon two questions which are, it is asserted, (a) pre-

sented by this case, and (b) of the highest importance from the standpoint of postal administration. We submit that neither (a) nor (b) can be substantiated.

The questions posed are:

> "(1) whether or not the Postmaster General has had confided to him by Congress in Section 14 of the Postal Classification Act a duty to determine whether a given periodical publication meets the prescribed condition that it be 'originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry', so as to be eligible for second class mailing privileges, and
>
> "(2) whether Congress may constitutionally confer such a duty upon him." (Petition, pp. 7-8).

The Questions Posed are not Presented by this Case.

As to Question (1), the issue in this litigation is not whether the Postmaster General may determine, as a basis for eligibility to second-class mail, whether a periodical publication is "originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts or some special industry". It is, rather, whether these words can be interpreted to mean that the Postmaster General is to decide "what is good for the public to read" (R. 1988).

Petitioner suggests that the Court of Appeals has held that Congress did not confide to the Postmaster General the duty to determine whether a periodical falls within the Fourth Condition. There was no such holding. The decision merely limited the claimed construction of the Fourth Condition. It struck down the additional condition which

the Postmaster General sought to read into the statute, i.e. the claimed power to censor on the basis of the value of content.

The construction of the Postmaster General involved the initial error of using the postal classification procedure as a means of passing upon the merit of the content of a publication. Under the Postal Law, Congress divided mailable matter into four classes: letters and postal cards in the first class, periodical publications in the second class, books and circulars in the third class, and miscellaneous material within certain weight, size and other limitations in the fourth class.[6] In enacting these classification provisions, Congress was concerned, not with the content and merit of written or printed material, but only with a physical allocation of mailable matter to certain classes whereby varying rates of postage could be charged. Advertising pamphlets, it is true, were excluded from the second-class but that was purely a regulation of a business practice and did not involve a review of the content and merit of the material published. To the extent that Congress was concerned over the content of written or printed material other statutes were specifically enacted so as to provide that, for example, obscene matter,[7] fraudulent material,[8] and seditious literature[9] were non-mailable in any class.

The foregoing clearly indicates that Congress never intended that the classification of mail should be used for the purpose of evaluating the content of the publication. The Postmaster General recognized the validity of this proposition in his Brief in the Court of Appeals where he

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[6]20 Stat. 358 (39 U. S. C. 221)
[7]35 Stat. 1129 (18 U. S. C. 334)
[8]35 Stat. 1130 (18 U. S. C. 338)
[9]40 Stat. 230 (18 U. S. C. 344)

stated that "a thought expressed in the form of a letter must pay 48¢ a pound for the use of the mails, the expression of the same thought in a book may be transmitted at 4¢ a pound; while in a magazine it may cost as little as 1½¢ a pound". This statement shows a realization of the fact that the classification of mail and the applicability of different rates of postage depend not on the content of the thought nor an evaluation of its merit but solely on the format by which it is conveyed.

Moreover, contrary to the impression conveyed by the Petition, the construction urged by the Postmaster is completely antagonistic to the history and purpose of the Fourth Condition. On the other hand the ruling of the Court of Appeals is completely consistent with that history and purpose. The present Postal Law, except for amendments not significant here, was enacted on March 3, 1879 and one of the primary objects of that legislation was to exclude from the more favorable second-class rates which had existed from the commencement of the postal system periodical publications devoted primarily to advertising. The effort of Congress to achieve this result brought about the enactment of the words of the Fourth Condition. The object of Congress in formulating the Fourth Condition in terms of the publication's content was to insure the exclusion of private advertising material from the low mailing rates.

The subsequent history of the Fourth Condition and its practical construction by all previous Postmasters General, establish beyond question that Congress did not intend to clothe the Postmaster General with the power to dispense second-class rates on the basis of his personal standards of what does or does not contribute to the public good and

welfare. The words of the Fourth Condition have always been understood to include all periodicals in the usually accepted sense and to exclude none.

In 1904 this was precisely the position taken by the Postmaster General before this Court in *Houghton v. Payne*, 194 U. S. 88 (Brief of Postmaster General in Supreme Court, pp. 34, 73).

In 1906 a Joint Commission of Congress made an exhaustive study of the second-class mail statute and concluded that the words of the Fourth Condition were "so broad as to include everything and exclude nothing."[10] This Postal Commission recommended an amendment to limit second-class rates to periodicals dealing with current topics but no limitation was made then or at any time since.

In 1911 another Postal Commission investigated the subject headed by former Mr. Chief Justice Hughes of this Court. That Commission reached virtually the same conclusion:

> "* * * but the experience of the post office has shown the impossibility of making a satisfactory test based upon literary or educational values. To attempt to do so would be to set up a censorship of the press. Of necessity the words of the statute—'devoted to literature, the sciences, arts, or some special industry'—must have a broad interpretation."[11]

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[10]House Document No. 608, Postal Commission 1906-07, 59th Congress, 2nd Session, "Report Regarding Second-Class Mail Matter" (pp. xxxvi-xxxvii).

[11]House Document No. 559, Postal Commission 1911-12, 62nd Congress, 2nd Session, "Report of Commission on Second-Class Mail Matter", p. 142.

Upon the trial in the District Court, an official of the Classification Division of the Post Office Department testified that in his 26 years of experience he had never known of a qualitative test being applied in the administration of the Fourth Condition (R. 1910-2).

Finally, the Postmaster General who made the revocation order in the case at bar made three rulings within the preceding six months in which he himself rejected the suggestion that the words of the Fourth Condition be used to justify a determination that the content of a periodical was not for the best interest of the public (Pl.'s Exs. 9, 10, 11, 12, 15, 16; 21 and 22 in District Court R. 1936-8, 1943).

Thus, we submit, the decision of the Court of Appeals is in full accord with the history and purpose of the Fourth Condition. The discussion likewise disposes of the suggestion that the decision makes the provisions of the Fourth Condition meaningless. The purpose of the Fourth Condition was to assist in the Congressional intent to exclude private advertising material from second-class mail. Otherwise it was designed to have an exceedingly broad interpretation and necessarily so, in view of constitutional principles of freedom of the press. The Court of Appeals decision does not mean that the Postmaster may not determine whether a given periodical complies with the Fourth Condition; it merely confirms what has been understood for the past sixty-five years, that such provisions cannot be interpreted to give the Postmaster General the power to pass upon what is good for the public to read.

As to Question (2), the claimed issue of the constitutionality of the right of Congress to permit the Postmaster General to administer the Fourth Condition is not presented by this case. The Postmaster General's argument

that that issue is presented is predicated on the erroneous premise that the Court of Appeals has decided that the Postmaster General shall not determine whether a periodical complies with the Fourth Condition. But, as we have said, the Court of Appeals made no such decision. The right of the Postmaster General to administer the Fourth Condition as it has been administered since 1879 remains unchanged. The constitutionality of that right is not in issue here.

It is true that the Court of Appeals, in holding that the Fourth Condition can not be interpreted in the manner urged by the Postmaster General, passed upon the corollary question, namely, that if the Fourth Condition could be so interpreted, it would be unconstitutional. A resolution of that constitutional issue was not and is not necessary to the decision of this case. The Court of Appeals merely chose to buttress its decision by referring to constitutional guarantees as well as to grounds of statutory construction. And in holding that the interpretation of the statute urged by the Postmaster General would be unconstitutional, the Court followed well-established precedents of this Court. No new question of federal law is presented. Therefore, even if the resolution of the constitutional issue had been necessary to the decision below, that decision is so clearly correct that there is no need for this Court to review it on certiorari.

The Postmaster General himself does not dispute that the constitutional guarantees of the First Amendment apply to the use of the mails. In fact, in his petition for certiorari he expressly "concede(s) that the wrongful denial of second-class privileges to a particular publication may constitute an infringement of constitutional guarantees" (Petition, pp. 14-15). Moreover, in his Brief in the Court

of Appeals the Postmaster General unequivocally disclaimed any argument that the use of the mails or of the second-class mail as such was a privilege as opposed to a right and therefore exercisable beyond the orbit of constitutional guarantees. He said:

> "The discussion in this opinion provides a complete answer to the contention * * * that the Postmaster General's decision is based on 'the so-called privilege doctrine' which treats the use of the mails not as a right but as a privilege similar to a bare license or sufference * * *. There is no such doctrine and no such contention."

The relevance of the First Amendment being thus conceded the unconstitutionality of a statute which would condition second-class privileges on the Postmaster's estimate of "what is good for the public to read" (R. 1988) is obvious. See *Near* v. *Minnesota*, 283 U. S. 697 (1931) where the statute declared unconstitutional set up standards far more precise than "contribution to the public good" and where this Court nevertheless said (pp. 721-2):

> "Equally unavailing is the insistence that the statute is designed to prevent the circulation of scandal which tends to disturb the public peace and to provoke assaults and the commission of crime. Charges of reprehensible conduct, and in particular of official malfeasance, unquestionably create a public scandal, *but the theory of the constitutional guaranty is that even a more serious public evil would be caused by authority to prevent publication.*" (Italics added).

This Court took similar action in *Grosjean* v. *American Press*, 297 U.S. 233 (1936) where a 2% tax on the gross

receipts of all newspapers having a circulation above a certain amount[12] was held unconstitutional. The Court pointed out that such a financial discrimination was just as invalid constitutionally as any more direct form of censorship (p. 249):

> "In the light of all that has now been said, it is evident * * * that by the First Amendment it was meant to preclude the national government, and by the Fourteenth Amendment to preclude the states, from adopting any form of previous restraint upon printed publications, or their circulation * * *.
>
> "This court had occasion in *Near* v. *Minnesota*, *supra*, at pp. 713 *et seq.*, to discuss at some length the subject in its general aspect. The conclusion there stated is that the object of the constitutional provisions was to prevent previous restraints on publication; *and the court was careful not to limit the protection of the right to any particular way of abridging it.*" (Italics added).

Nor is a proper question of constitutionality raised by the Postmaster General's assertion that the opinion of the Court of Appeals "casts grave doubt upon the constitutionality of possible future legislation for dealing with the problem" (Petition, p. 8). In substance he is asking this Court to give an advisory opinion on the constitutionality of some future legislation which might attempt to grant him the power which he has assumed here by his unwarranted construction of the Fourth Condition. Certainly it is not the function of this Court to set forth in the abstract the limits to which Congress might go, if

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[12]The additional burden imposed upon Esquire in the present case is $500,000 per year (R. 1972).

willing, in granting additional powers to the Postmaster General.[13]

The Case Presents no Question of Importance from the Standpoint of Postal Administration.

The Fourth Condition was enacted over 66 years ago. For about 65 years, until the revocation order in the instant case, no Postmaster General ever attempted to interpret the Fourth Condition as requiring him to pass upon the quality of the material published. In fact, as we have noted above, even the Postmaster General who made the revocation order here rejected that idea on several occasions prior to the instant case. The uncontradicted testimony of J. O. Bouton, an official in the Classification Division of the Post Office Department for over 26 years, was that no qualitative test has ever been applied, to his knowledge, in administering the Fourth Condition (R. 1910-12). In this connection it may be noted that 25,000 publications now enjoy second-class rates (R. 1888). From this number and for the first time in all these years, an attempt was made to apply a qualitative test to Esquire magazine.

The foregoing clearly shows the lack of substance in petitioner's assertion that this case is "of the highest importance from the standpoint of postal administration". If Postmasters General had no difficulties of administration for the past 65 years it may reasonably be asked why the opinion of the Court of Appeals in the instant case, confirming all past administrative practice, "leaves the Post Office Department at sea".

[13] It may be noted that the Postmaster General, at the time apparently undisturbed by any constitutional question, on the very day when the Court of Appeals handed down its decision, wrote to the Post Office and Post Roads Committee of Congress calling for prompt legislative action. New York Times, June 5, 1945, p. 17.

Whatever administrative difficulties the Postmaster General believes he is laboring under are those of his own creation. We think that this Court will not be impressed by an argument that a question of great administrative importance is involved because an official has himself created confusion by attempting to inaugurate an untenable construction of a statute. And in passing we may suggest the enormity of the administrative problem which would result if the Postmaster General's theory were upheld.

CONCLUSION

The opinion of the Court of Appeals was obviously correct. The decision is in accord with the broad policy of protecting freedom of speech and of the press exemplified by the recent decisions of this Court. No sound reason exists for a review by this Court. The petition for writ of certiorari should be denied.

September 28, 1945.

Respectfully submitted,

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